Supreme Court, U.S.
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No. 98-927

In the Supreme Court of the United States

OCTOBER TERM, 1998

RAYMOND V. MOYLE, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, AND JONES OREGON STEVEDORING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Social Security Act authorizes the garnishment of "moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States * * * to any individual" to satisfy "the legal obligation of the individual to provide child support or alimony." 42 U.S.C. 659(a) (Supp. II 1996). The question presented is:

Whether the Social Security Act's garnishment provision applies to disability benefits paid by the Treasurer of the United States under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 944.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 147 F.3d 1116. The Benefits Review Board's notice of affirmance (Pet. App. B1-B2) is unreported. The decision and order of the administrative law judge (Pet. App. C1-C8) is reported at 28 Ben. Rev. Bd. Serv. (MB) 73.

JURISDICTION

The court of appeals entered its judgment on June 29, 1998. A petition for rehearing was denied on September 4, 1998 (Pet. App. D1). The petition for a writ of

certiorari was filed on December 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903 (1994 & Supp. II 1996). The benefits, which vary with the nature of the disability, are calculated as a percentage of the employee's pre-injury wage-earning capacity. 33 U.S.C. 908, 910.

Most Longshore Act benefits are paid directly by covered employers or their insurance carriers. 33 U.S.C. 904. Some benefits, however, are paid out of a "special fund," which the Longshore Act establishes in the United States Treasury. 33 U.S.C. 944. The special fund is financed by covered employers and insurers, 33 U.S.C. 944(c), and is used to pay several categories of Longshore Act benefits, 33 U.S.C. 944(i), including those payable to employees who, having a preexisting permanent partial disability, suffer a second permanently disabling injury, 33 U.S.C. 908(f)(2)(A), 944(i)(2); see generally 20 C.F.R. 702.143-702.148. Although the monies in the special fund are not "money or property of the United States," the Treasurer of the United States acts as their custodian and disburses them as directed by the Secretary of Labor. 33 U.S.C. 944(a) and (b).

Since 1927, the Longshore Act has contained an anti-alienation provision, which directs that:

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid,

> and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

33 U.S.C. 916. That provision has been interpreted to prohibit the garnishment of Longshore Act benefits to satisfy claims for spousal or child support. See *Thibodeaux* v. *Thibodeaux*, 454 So. 2d 813 (La. 1984), cert. denied, 469 U.S. 1114 (1985); *Spitalieri* v. *Spitalieri*, 593 N.Y.S.2d 172 (Sup. Ct. 1993).

b. In 1975, Congress amended the Social Security Act to waive the United States' sovereign immunity in order to permit the garnishment of compensation and benefits paid by the United States to meet a payee's alimony and child support obligations:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357-2358.

In 1977, Congress amended the garnishment provision by adding definitions of terms and by authorizing the President (or his designee) to issue implementing regulations. See Tax Reduction and Simplification Act

of 1977, Pub. L. No. 95-30, Tit. V, § 501(b), (c) and (d), 91 Stat. 158, 159-161. As pertinent here, the 1977 amendments defined moneys "based upon remuneration for employment" to include:

> periodic benefits * * * under * * * any other system or fund established by the United States * * * which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual * * * .

91 Stat. 160-161.

In 1996, Congress again revised the garnishment provision. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362, 110 Stat. 2242-2247. The 1996 law defines the "moneys subject to process" as, among other things, "worker's compensation benefits paid under Federal or State law." See 110 Stat. 2244, 2245 (codified at 42 U.S.C. 659(h)(1)(A)(iii)(Supp. II 1996)).[1]

2. In 1981, petitioner, who already had a preexisting partial disability, was awarded Longshore Act benefits for a second injury that resulted in his permanent and total disability. Since 1982, his benefits have been paid out of the special fund. Pet. App. A5; Gov't C.A. Br. 3. In 1991, a state court in Oregon

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[1] The 1996 amendments became effective February 22, 1997. Pub. L. No. 104-193, § 362(d), 110 Stat. 2247. To the extent petitioner seeks to terminate the administrative law judge's authorization of continuing garnishment, his case is governed by the current provisions of the law. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273-274 (1994). To the extent he seeks back benefits that accrued prior to February 22, 1997, his case is governed by the version of the law that was in effect prior to the 1996 amendments.

ordered the garnishment of a portion of petitioner's Longshore Act benefits to satisfy his more than $30,000 in delinquent spousal support obligations. Pet. App. C2. When the Director of the Office of Workers' Compensation Programs notified petitioner that he would honor the garnishment order, petitioner requested a hearing. *Id.* at A5.

The administrative law judge (ALJ) upheld the garnishment. Pet. App. C6. The ALJ held that the Social Security Act's garnishment provision "overrides" the Longshore Act's anti-alienation provision, thereby permitting garnishment of benefits paid out of the special fund. *Id.* at C4. The ALJ gave particular weight to the Office of Personnel Management's (OPM) 1980 regulation, which identified "[b]enefits received under the Longshoremen's and Harbor Workers' Compensation Act" as subject to garnishment, 5 C.F.R. 581.103(c)(5). Pet. App. C3-C4.

Petitioner appealed to the Benefits Review Board (Board). While that appeal was pending, Congress directed that any administrative decision that had been pending on appeal before the Board for more than one year on September 12, 1996, would be considered affirmed. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-219; see generally *Director, OWCP* v. *Sun Ship, Inc.*, 150 F.3d 288, 291-292 (3d Cir. 1998). Because petitioner's appeal had been pending the requisite period of time, the ALJ decision became the final decision of the Board by operation of law. Pet. App. B1-B2.

3. The court of appeals affirmed. Pet. App. A1-A18. It concluded that, because the Longshore Act's anti-alienation provision (33 U.S.C. 916) and the Social Security Act's garnishment provision (42 U.S.C. 659 (Supp. II 1996)) are in "irreconcilabl[e] conflict[]," Pet.

App. A9; see also *id.* at A9-A13, the latter impliedly repealed the former for purposes of special fund payments. *Id.* at A12-A13. The court explained that the Longshore Act benefits at issue both fall within the plain reach of the garnishment provision's language, *id.* at A10-A11, and were specifically identified in the legislative history of the 1977 amendments as a category subject to garnishment, *id.* at A12.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred in construing the Social Security Act's garnishment provision and the Longshore Act's anti-alienation provision to permit garnishment of a portion of his special fund benefits. Because the court of appeals' decision represents the first and only court ruling of which we are aware that addresses the garnishment of Longshore Act special fund benefits; because the sole argument advanced in the petition in support of review has never been addressed by any court of appeals, including the court below; and because the decision below is consistent with the language of both the Social Security and Longshore Acts and with the longstanding, shared interpretation of the two agencies with rulemaking authority under those statutes, review by this Court is not warranted.

1. The sole argument advanced by petitioner to support review (Pet. 7) is that the Social Security Act's garnishment provision does not supersede the Longshore Act's anti-alienation provision because the Social Security Act subjects federal payments to garnishment only "to the same extent" as if they were paid by a private person. As petitioner admits (Pet. 9 n.5; Pet. C.A. Pet. for Reh'g 4), however, he never briefed this argument below, nor did the court of appeals address it.

See also Pet. App. A13-A17 (identifying and addressing arguments petitioner did raise); Pet. C.A. Br. 2-4. Rather, petitioner's current contention appeared for the first time at oral argument and in his petition for rehearing. By failing to brief the argument before the court of appeals, petitioner waived it. See *Stivers* v. *Pierce*, 71 F.3d 732, 740-741 n.5 (9th Cir. 1995) (argument not briefed, and raised only for the first time at oral argument, is deemed waived). This Court generally will not review arguments that were neither preserved below nor addressed by the court of appeals. See, *e.g.*, *NCAA* v. *Smith*, No. 98-84 (Feb. 23, 1999), slip op. 10 ("[W]e do not decide in the first instance issues not decided below."); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

2. Petitioner does not dispute that the court of appeals applied the pertinent legal analysis and decisions of this Court in determining whether the Social Security Act's garnishment provision superseded the Longshore Act's anti-alienation provision as applied to special fund payments. To the contrary, petitioner espouses the same legal test that the court of appeals applied, analyzing whether the two provisions are in irreconcilable conflict (compare Pet. 6-11 with Pet. App. A10-A13), and relies upon the same authority as the court of appeals (compare Pet. 8-9 with Pet. App. A9 (both relying upon *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). Petitioner thus simply disagrees with how the court of appeals applied settled legal principles to the particular matter at issue. In the absence of a conflict of decisions, that claim does not warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981).

3. Moreover, the court of appeals' decision is correct. Petitioner's Longshore Act benefits fall within the plain

language of the garnishment provision. They were and are being paid after 42 U.S.C. 659(a)'s triggering date of January 1, 1975. See Pet. App. A5. They constitute "moneys (the entitlement to which is based upon remuneration for employment)," because they are calculated with reference to and serve as a substitute for petitioner's prior wages as an employee of Jones Oregon Stevedoring Company. See 33 U.S.C. 908; Decision and Order Awarding Benefits, Pet. C.A.E.R. 14-17. Indeed, the garnishment provision separately defines the "[m]oneys subject to process" under its terms to include "periodic benefits * * * under any other system or fund established by the United States which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual." 42 U.S.C. 659(h)(1)(A)(ii)(II) (Supp. II 1996); see also 42 U.S.C. 659(h)(1)(A)(iii) (Supp. II 1996) ("worker's compensation benefits paid under Federal or State law" subject to garnishment).[2] Finally, the benefits paid by the Treasurer of the United States are moneys "payable by" the United States, as petitioner now concedes (Pet. 7 n.4).

Petitioner contends (Pet. 6-11) that 42 U.S.C. 659(a) (Supp. II 1996) applies only to payments that a "private person" would also have to make and, because the payment of Longshore Act benefits by private employers and insurers falls within the Longshore Act's anti-

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[2] Prior to the 1996 amendments, one district court had held that payments under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, were not subject to garnishment under 42 U.S.C. 659. See *Douglas* v. *Donovan*, 534 F. Supp. 191, 195 (D.D.C. 1982), vacated, 704 F.2d 1276 (D.C. Cir. 1983).

alienation provision, 33 U.S.C. 916, the United States' payment of petitioner's benefits must similarly be insulated from garnishment. Petitioner, however, reads the reference to "private persons" out of context. Read in full, the provision states: "the United States * * * shall be subject, in like manner and to the same extent as if the United States * * * were a private person, to withholding * * * and to any other legal process brought * * * to enforce the legal obligation of the individual to provide child support or alimony." 42 U.S.C. 659(a) (Supp. II 1996). The reference to private persons thus does not qualify the types of payments subject to garnishment. Those are earlier defined comprehensively as all "moneys (the entitlement to which is based upon remuneration for employment)" payable to "any individual" by the United States. 42 U.S.C. 659(a) (Supp. II 1996). Rather, the reference to the liability of private persons limits only the extent to and manner in which the United States "shall be subject * * * to withholding * * * and to any other legal process." The comparison to private persons, in other words, is a qualification on the procedures that can be used to effect garnishment, not the moneys subject to garnishment. See also 42 U.S.C. 662(d) (1994) (defining "private person" as "a person who does not have sovereign or other special immunity or privilege which causes such person not to be subject to legal process").

The legislative history of Section 659 supports this interpretation. The 1974 Senate Report on the original legislation specifically recognized that the garnishment provision would "override provisions in various social insurance or retirement statutes which prohibit attachment or garnishment." S. Rep. No. 1356, 93d Cong., 2d Sess. 54 (1974). Furthermore, in the course of the 1977

amendments, Longshore Act benefits paid by the United States were specifically identified as embraced by the garnishment provision. See 123 Cong. Rec. 9019 (1977) (Sen. Nunn) ("[T]he provisions of section [659] would apply, in addition to those already mentioned, to payments under * * * the Longshoremen's and Harbor Workers' Compensation Act (but only in cases where the payments are made by the United States)."); *id.* at 12,913 (Sen. Nunn) (same).

In addition, OPM, which is responsible for administering and promulgating implementing regulations for Section 659(a),[3] and the Secretary of Labor, who is charged with administering the Longshore Act, 33 U.S.C. 939(a), both agree that Longshore Act benefits are subject to garnishment under Section 659(a), notwithstanding the Longshore Act's anti-alienation provision. Indeed, since 1980, an OPM regulation has identified Longshore Act benefits paid by the United States as subject to garnishment. 5 C.F.R. 581.103(c)(5). The shared interpretation of the two federal agencies vested with rulemaking authority with respect to the relevant statutory provisions merits substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

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[3] See 42 U.S.C. 659(g)(1) (Supp. II 1996); Exec. Order No. 12,105, 3 C.F.R. 262 (1979), as amended, Exec. Order. No. 12,107, 3 C.F.R. 264 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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